

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

NuAire, Inc.,

Court File No. _____

Plaintiff,

v.

COMPLAINT

Merrill Manufacturing Corporation,

Jury Trial Demanded

Defendant.

Plaintiff NuAire, Inc., as and for its Complaint against Defendant Merrill Manufacturing Corporation, states and alleges as follows:

PARTIES

1. Plaintiff NuAire, Inc. ("NuAire") is a Minnesota corporation with its principal place of business in Plymouth, Minnesota. NuAire is engaged in the business of manufacturing laboratory equipment for, among others, hospitals and universities.

2. Defendant Merrill Manufacturing Corporation ("Merrill") is, upon information and belief, a Wisconsin corporation with its principal place of business in Merrill, Wisconsin. Merrill is engaged in the business of manufacturing and selling custom wire form products.

INTRODUCTION

3. This case arises out of Merrill's sale to NuAire of door catches which NuAire incorporated into incubators NuAire manufactured and sold. Among other things, the catches were defective such that they damaged the incubators into which they

were incorporated, leaving NuAire with no choice but to recall the incubators, which has damaged NuAire in an amount in excess of \$1.8 million. In this action, NuAire seeks recovery of these damages, asserting causes of action for breach of contract, breach of express warranty, breach of implied warranties and reckless misrepresentation.

FACTUAL BACKGROUND

4. One of the products NuAire sells is a water jacket incubator used by laboratories and hospitals for, among other things, growing cultures. These incubators are somewhat similar in outward appearance to an under-counter refrigerator. However, instead of there being insulation between the inner and outer cabinets as in a refrigerator, in NuAire's water jacket incubators, water circulates between the two cabinets to maintain the required controlled environment inside the incubator. Because of the water circulating between them, the two cabinets are made of stainless steel.

5. NuAire's incubators have a door that is kept tightly sealed by a u-shaped catch attached to the outer cabinet through which a latch attached to the door is slipped. The catch is made out of a ¼ inch diameter steel rod that is bent into a u-shape. In manufacturing, this type of part is generally referred to as a custom wire form product.

6. NuAire attaches the catch to what becomes the outside of the outer stainless steel cabinet of the incubator by placing the two ends of the "u" through holes in the outer cabinet and then welding those ends from what becomes the inside of the outer cabinet. NuAire then assembles the two cabinets into a single incubator. As a result, once the incubator is operational, the two ends of the "u" of the door catch are exposed to the water circulating between the two stainless steel shells. Accordingly, to prevent

leaking and rusting, and ultimately the failure of the catch and the loss of the controlled environment inside of the incubator, the catches must also be made of stainless steel.

7. Since at least 2004, NuAire has been purchasing the stainless steel catches from Merrill without any significant issues. Then, on or about December 22, 2009, Merrill delivered 1065 catches to NuAire pursuant to Purchase Order 153274, again representing, as usual, that the catches were made of stainless steel. Unbeknownst to NuAire at the time, the catches were not stainless steel as Merrill had represented and NuAire thus proceeded in the normal course of its operations to incorporate the catches into the incubators it manufactured and sold.

8. On information and belief, the catches were not stainless steel due to product tampering by Merrill employees.

9. On or about December 20, 2010, NuAire began receiving complaints from its customers that the catches were rusting and causing incubators to leak. Upon further investigation, NuAire learned that the catches Merrill had delivered to it in December 2009 were not stainless steel and that as a result they were rusting and causing incubators to leak. As a result, NuAire is inspecting and testing the incubators in the field that may have been manufactured with the non-stainless steel catches and recalling and replacing the units that have the non-stainless steel catches. NuAire estimates that the cost of this inspection, testing and recall and replacement will be in excess of \$1.8 million and that its business reputation has been and will be harmed.

COUNT I – BREACH OF CONTRACT

10. NuAire incorporates by reference the preceding paragraphs.

11. Merrill breached its contractual obligations to NuAire because, among other things, the catches do not conform to contract specifications, are not fit and sufficient for the purposes intended, are not merchantable, are not of good material and workmanship, and were defective in that they were not stainless steel as specified and represented.

12. These breaches of contract have damaged NuAire in an amount to be proven at trial in excess of \$50,000.

COUNT II – BREACH OF EXPRESS WARRANTY

13. NuAire incorporates by reference the preceding paragraphs.

14. Merrill breached express warranties to NuAire in that, among other things, the catches were not stainless steel.

15. As a result of these breaches of express warranties, NuAire has been damaged in an amount to be proven at trial in excess of \$50,000.

COUNT III – BREACH OF IMPLIED WARRANTY OF FITNESS

16. NuAire incorporates by reference the preceding paragraphs.

17. Merrill impliedly warranted the fitness of the catches sold to NuAire.

18. Merrill was aware of the purpose for which NuAire sought to purchase the catches.

19. Merrill was aware that NuAire acted in reliance on its production and sale of stainless steel catches in deciding to purchase them from Merrill.

20. The catches that NuAire purchased were unfit for the purpose for which NuAire purchased them.

21. As a result of Merrill's breaches of implied warranties of fitness, NuAire has been damaged in an amount to be proven at trial in excess of \$50,000.

COUNT IV – BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

22. NuAire incorporates by reference the preceding paragraphs.

23. Merrill manufactured and sold to NuAire catches for use in NuAire's incubators.

24. The catches purchased by NuAire were defective and were not fit for the ordinary purpose for which such catches are purchased and used.

25. As a result of Merrill's breaches of the implied warranties of merchantability, NuAire has been damaged in an amount to be proven at trial in excess of \$50,000.

COUNT V – RECKLESS MISREPRESENTATION

26. NuAire incorporates by reference the preceding paragraphs.

27. Merrill's false representations that the catches were stainless steel were made recklessly.

28. Merrill intended to induce NuAire to rely on these representations and NuAire was justified in acting on reliance upon them.

29. NuAire suffered damage resulting from acting in reliance upon the representations in an amount to be proven at trial in excess of \$50,000.

WHEREFORE, Plaintiff NuAire respectfully requests that this Court enter judgment in its favor as follows:

1. For a judgment in favor of NuAire and against Merrill in an amount to be proven at trial in excess of \$50,000;
2. For an award of interest and NuAire's fees and costs incurred in bringing this action to the extent allowed by law; and
3. For such other relief as the Court may deem just and equitable.

LINDQUIST & VENNUM PLLP

Dated: May 12, 2011.



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